CAT

No. 18-1303

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
JL v. Polson
Appeal from the U.S. District Court for Eastern Virginia, Alexandria
D.C. No. 1:17-cv-13 AJT-JFA

APPELLANT'S PETITION FOR REHEARING EN-BANC

DUE TO CONFLICTS WITH CIRCUIT, DISTRICT, AND MANDATORY PRECEDENT AFFIRMING CLAIMED VIOLATIONS OF THE FOURTH AMENDMENT AND BARRING QUALIFIED IMMUNITY,
AND
PERMANENT, NATIONAL QUALIFIED IMMUNITY AND SUPRA-JUDICIAL AUTHORITY ISSUED TO TSA VIA DISTRICT COURT PROTECTIVE ORDER

CAPTAIN JAMES LINLOR (pro se)
Plaintiff – Appellant,

v.

MICHAEL GERARD POLSON
(in his individual capacity)
Defendant – Appellee

Appellant/Plaintiff
Capt. JAMES LINLOR (pro se)
1405 S. Fern Street #90341,
Arlington, VA 22202
(775) 298-1505

Appellee/Defendant:
MICHAEL GERARD POLSON
in his individual capacity
817 Carlton Otto Lane #23,
Odenton, MD 20120
c/o Kimere J. Kimball, Asst US Attorney
2100 Jamieson Ave, Alexandria, VA 22314
(703) 299-3763 ph; (703) 299-3983 fax

Table of Contents

TABLE OF AUTHORITIES

CIRCUIT RULE 35.2 STATEMENTS

I express a belief, based on a reasoned and studied professional judgment as a professional airline pilot and expert in cybersecurity, of the following:

(1) The panel decision conflicts with decisions of the United States Supreme Court and of the E.D.VA district and 4th Circuit (E.W. v. Dolgos; US v. Cowden; Yates v. Terry; Riley v. Dorton; Smith v. Ray, E.D.VA 2015 affirmed in 4th Cir 2015; Graham v. Connor; Malley v. Briggs; and Wolk v. Seminole County), where an extensive body of law has found Fourth Amendment excessive force claims affirmed in closely similar cases, and qualified immunity similarly denied, where consideration by the full court en-banc is therefore necessary to secure and maintain uniformity of the court's decisions.

(2) This proceeding's US district court explicitly ordered permanent, nationwide qualified immunity on TSA and its employees, This permanent, nationwide order, in contradiction with established code 49 CFR 114(r) and granting authority to DOJ/TSA to override all future claims by illegal re-categorization of evidence as Sensitive Security Information (SSI) and thereby ***inadmissible*** to shield itself from any future lawsuits despite any level of unconstitutional force-injury harm to anyone, anywhere, regardless of established law, compels that this case presents a question of exceptional importance.

(3) Frauds upon the district court listed in a motion on appeal for sanctions with this court (uncontested in the record-on-appeal and not denied by appellee or his TSA and DOJ attorneys) where the US DOJ and attorneys were similarly sanctioned in US v. Bundy (with plaintiff-defendant roles reversed from this case, but again the US DOJ in clear violation through withholding and spoliation of evidence). This instant case's fraudulent evidence of undisclosed witnesses (TSA's Dillard and Yanette) were not listed in FRCP Rule 26 disclosures, and denied to exist in testimony in the record by appellee, TSA, and appellee's TSA supervisor (Whetsell). Testimony of Dillard and Yanette, listed as critical in footnote 6 of the district court's ruling, were uniquely filed under seal by appellee's TSA and DOJ attorneys and not served on appellant, where pro se plaintiff-appellant, would not see their filings since appellant was known to not be on PACER. Dillard and Yanette were not permitted to be deposed, nor their video evidence challenged or unedited copies inspected. Without their testimony, the district court would likely have disregarded TSA's security video, which instead it found compelling. This serious malfeasance warrants not only reversal, but sanctions upon the TSA, DOJ, and their attorneys.

(4) This appeal involves the following questions of exceptional importance:

- Does the admitted and video-recorded striking with apparent excessive force

by defendant-appellee (in his individual capacity) of a cooperative airline passenger's testicles (particularly with an excessive force injury documented that nerve-deadening surgery was required), along with precedent, constitute a violation of the Fourth Amendment as it has in other, similar cases?

- Is qualified immunity granted despite established law known prior to this case within this district, despite precedent denying qualified immunity in similar excessive force situations, and despite evidence from TSA and appellee's testimony affirming that no custodial, exigent, or TSA procedures or causes existed for striking plaintiff's testicles with justification or excuse?
- Was the district court's improper granting of qualified immunity influenced by TSA's and defendant's filings and testimony that defendant was NOT a TSA law enforcement officer, but rather defendant's claim (denied on the district court's motion ruling as "straining credulity") that defendant "did not know" that it would be illegal for him to strike plaintiff's testicles with excessive force, while TSA has later claimed law enforcement officer status in other US federal cases in clearly duplicitous filings?
- Do the police-report and multiple TSA-witness attestations of the common law arrest of defendant-appellee by plaintiff-appellent for felony sexual battery, constitute a felony arrest recognized in other circuit courts as cited?

- Does cause exist to vacate a granted permanent, national protective order when no Sensitive Security Information (SSI) has been been transmitted to plaintiff-appellant (despite two orders to compel production) in this case per the record-on-appeal, when this rubber-stamped district order written by TSA grants permanent qualified immunity to all current and future TSA agents, and authority for TSA to overrule any court and designate (even retroactively) evidence to be treated as SSI and therefore inadmissible, barring any future cases against TSA, while violating 49 CFR 114(r)?
- Does the district court's reliance on a single security video fail per district, circuit, and mandatory precedent because:
  - TSA and defendant-appellee admitted spoliation of other security videos and ESI (text messages and emails), requiring that those critical evidence inputs be considered in the best light for plaintiff, which they were not?
  - the video was admitted to have been edited by TSA while TSA refused to explain or prove what was edited out, but with the resulting video having clearly missing frames noted by the district court in on-the-record on appeal testimony from the hearing transcripts in the record on appeal, where other passengers and TSA agents magically appear and disappear as the district court acknowledged and this court can view in the video

record-on-appeal, but yet frame continuity of the striking of plaintiff's testicles to attempt to diminish striking-force assessments was allowed and explicitly relied upon despite circuit precedent not allowing such conclusions and specifically assigning them as irrelevant in circuit precedent?

- comparative examples through an appellant-produced doll video (in the record-on-appeal) with unedited ***and*** separate, edited missing frame versions of an egg being cracked by a similar-to-defendant's karate chop motion as evidence of how plaintiff's testicles were struck by appellee, proving the single security video as inconclusive as to force when on-the-record proof of missing frames in TSA's security video exists?

/s/ Captain James Linlor, in pro per

Captain James Linlor

INTRODUCTION[1]

While transiting a TSA security screening checkpoint at Dulles Airport on March 10, 2016, plaintiff-appellant Captain James Linlor, an airline captain off-duty at the time, offered himself to a normal security pat-down conducted by defendant-appellee TSA screener Michael Gerard Polson. Along with Linlor's US Navy contractor ID card all noted in the Complaint and record on appeal, Appellant was carrying multiple "verification cards" used to access classified US Government systems as part of Linlor's second job as a senior cybersecurity specialist. Linlor is barred by Executive Orders and DoD Rules to release those cards from his direct and proximate custody[2]. Polson was offered to hand-inspect these cards, but objected, became irate, and attempted to illegally confiscate and remove them, which Linlor was obliged to refuse. Linlor attempted to de-escalate by asking for Polson's TSA supervisor to assist. After TSA agreed to simply perform a standard pat-down of Linlor and proximately inspect the cards, Polson ordered Linlor

---

1 Copies of the panel's opinion and district court judgment are attached hereto as Appendices A and B, respectively. A copy of the disputed permanent nationwide protective order granted to TSA is included in Appendix C.

2 Per Department of Defense (DoD) Instruction 1000.13, dated January 23, 2014, Enc 3(2)(h) "A [verification] card shall be in the **personal custody** of the individual to whom it was issued [Appellant] **at all times**." Additionally FAA Order 2150-3B_W requires authority and cause for [verification cards] to be surrendered.

(shown in the video record and confirmed in testimony by Polson) to spread his legs wider than the TSA-proscribed floormat footprints (Polson later testified in the record that 'he did not know why he made this request', and that no clothing or any other cause made such stance widening necessary), and karate-chopped Linlor's testicles with alleged excessive force. No exigent, custodial, or split-second situations existed; Linlor's status (per Graham v. Connor) was that of a "free citizen." Despite clear and continuing pain, Linlor attempted to de-escalate the situation by demanding an apology from Polson. Polson laughed, claimed that his striking of Captain Linlor was intentional, and that he could not be prosecuted. Polson later testified and TSA provided documents in the record proving that Polson received no remedial training or reprimand, and was instead awarded a $250 cash bonus (as Polson indicated is typical for TSA screeners to receive if they abuse passengers, raising concerns over a taxpayer-funded game by screeners to violate passengers' rights while receiving bonus awards). Metropolitan Washington Airports Authority (MWAA) police were called at Linlor's request for Linlor to press charges for felony sexual battery (the felony sexual battery level also being listed in TSA National Security Operations Center, aka NSOC's report explicitly forwarded and broadcast to Linlor's home state of Nevada, as well as in California and Hawaii, all where Linlor has since received abusive and aggressive

excessive force retaliatory pat-downs by TSA screeners), but MWAA police refused at the time to assist Linlor to press charges for felony sexual battery against Polson. After a final opportunity to apologize refused by Polson *and* Polson's TSA supervisors up to the TSA airport station chief (FSD) Scott Johnson, Linlor proceeded to arrest TSA screener Michael Gerard Polson for felony sexual battery, the felony arrest and requested transfer to MWAA police custody affirmed by the MWAA police report, and multiple TSA supervisor and FSD attestations in the record on appeal, with no contradicting attestations. Exactly parallel common law recognizing common law arrests have case law *stare decisis* in the 9th Circuit, and are used by police nationwide when they arrest suspects outside of their duty hours or local jurisdictions, with a significant body of law[3] (including from the Virginia Supreme Court) recognizing and in support of the arrest, in the record on appeal. TSA's publicly available Standard Operating Procedures (SOP) and pat-down training methods (with Polson's specific records) were produced in discovery; none authorize or grant striking of a passenger's genitals. Polson testified in the record to "striking" Linlor's testicles, but claimed he (Polson) did not feel the striking was excessive, and that **he (Polson) did not know it would be illegal and against the 4th amendment to strike a compliant passenger's testicles with**

3 Case citations for common law arrests are provided in the Table of Authorities.

excessive force. The district court cited in a motion ruling that this "strained credulity." News commentators have since referred to TSA agent Polson's excuse as "an idiot's defense." Polson and his TSA manager William Whetsell both testified in the record that no TSA definitions of excessive force exist (perhaps intentionally to avoid a standard of care), that no guidance or allowance for striking of passengers exists, and that no tools (such as force-measuring dummies) or methods to avoid use of potential excessive force exist or are employed by TSA in training.

Despite precedent (district, Fourth Circuit, and mandatory) in parallel cases and evidence to the contrary, the district court granted summary judgment to the individual capacity TSA screener Polson, and affirmed a permanent, nationwide protective order granted to TSA establishing 1) permanent nationwide qualified immunity for TSA agents to strike even compliant, non-custodial passengers with excessive force and without cause being needed, regardless of future established law; 2) authority for TSA to retroactively designate any evidence as Sensitive Security Information (SSI), foreclosing future cases by anyone since SSI is inadmissible despite this practice being explicitly illegal per 49 CFR114(r) as noted to but disregarded by the district court and circuit panel in the record on appeal; 3) establishing excessive fines for Linlor beyond statutory fines for release

of SSI despite evidence in the record of TSA refusing to comply with two Orders to Compel Discovery and not contesting their refusals to hand over ***any*** alleged SSI in-person on two occasions, and refusing to electronically transfer alleged SSI via military-confidential file sharing (AMRDEC), to which both Linlor and DOJ attorney/Navy JAG Dontae Sylvertooth had access, as proven in the record; and 4) establishing permanent un-qualified immunity for all US Government employees to release SSI without penalty, as a likely setup for TSA/DOJ to leak SSI after this case is finished to frame and fine Linlor, but to have immunity if their misdeeds are discovered. This national, permanent protective order would also extend immunity for potential misdeeds by DOJ/TSA and jeopardy to plaintiffs in all future cases. For these reasons, this Court should vacate the panel's opinion and rehear this case en banc.

ARGUMENT

The Transportation Security Administration (TSA) has been sued hundreds of times for many reasons. Apparently numbed or pre-disposed by previous rulings, the district court's final ruling appears to be based on matters not claimed by the plaintiff-appellant, and ignores both obvious evidence and fundamental (and criminal) ***withholding*** of evidence submitted under seal and denied to Plaintiff-appellant to exist in Rule 26 filings and deposition testimony by Polson and his

TSA supervisor Whetsell, yet ironically **cited in the district court's opinion**. One need not pry deeply to find errors of law in the district court's ruling, but the Circuit panel's summary opinion without analysis disregarded significant errors and contrary to precedent, guidance, FRCP Rules, and federal law, supports vacating of the circuit panel's decision, and compelling an en banc rehearing.

Five reasons exist for this Court to vacate the panel's opinion and rehear this case en banc:

I. DISTRICT, FOURTH CIRCUIT, AND MANDATORY PRECEDENT PROSCRIBE A FOURTH AMENDMENT VIOLATION

As recently as February 2018 and prior to the April 15, 2018, reconsidered District Court's and Circuit Panel's rulings, the Fourth Circuit ruled in E.W. v. Dolgos, 16-1608 4th Circuit, that a Fourth Amendment violation can and does occur as stated:

> "Dolgos took a situation where there was no need for any physical force and used unreasonable force disproportionate to the circumstances presented. We therefore find that Dolgos's actions amount to excessive force. As such, E.W. has demonstrated a violation of her constitutional rights under the Fourth Amendment."

Exceptionally noteworthy is that uncontested testimony by defendant-appellee and police and TSA supervisors affirm that plaintiff-appellant was ***never*** in custody, was fully cooperative, and that no exigent or distracting circumstances occurred, as

is evident on the video in the record.

Mandatory precedent affirms, which the Circuit panel and District Court ignored:

> "The constitutional standards for permissible force depend entirely upon the custodial status of the alleged victim of force—that is, whether the victim is in some stage of arrest, or a free citizen. A free citizen is protected under the 4th Amendment's search and seizure standard, and to violate the Constitution an official's use of force must not be "objectively unreasonable." Graham v. Connor, 490 U.S. 386, 396-97 (1989).

Appellant claims that 4th Amendment protections are a "basic right" (per Malley) such that, as Judge Cacheris opined in this instant case, "… gratuitously striking an individual in the groin while searching them violates the Fourth Amendment.[4]" Per the Supreme Court, Fourth Amendment cases requires courts to assess the reasonableness of [force] based on the circumstances.[5] Since no amount of striking force against a passengers testicles is possibly reasonable nor proscribed in TSA procedures, appellee's striking of appellant's genitalia is inherently a Fourth Amendment violation.

Precedent from other local cases, despite TSA and Polson repeatedly attesting and testifying in the record that TSA screeners are not law enforcement officers (LEOs), indicates that claims of excessive force support a Fourth Amendment violation in this E.D.VA district and Fourth Circuit even when LEOs *are* involved. Inarguably, a lesser standard exists here for a Fourth Amendment violation, which

4 Memorandum Opinion and Order [Doc 70] page 29
5 United States v. Drayton, 536 U.S. 194, 201 (2002)

the Circuit panel and District Court should have used, but did not. Precedent from actions in Cowden[6] parallel appellee Polson's attitude and actions in this instant case, since appellee appears to have been angry that Appellant could not lawfully surrender US Government DoD & FAA cards, resulting in retribution by appellee striking appellant's genitals with excessive force. Appellant's claim does not rely on appellee Polson's potential state of mind.

While injury is not required to support a Fourth Amendment violation, plaintiff-appellant received injuries unresolved after more than a full year, and requiring nerve-deadening surgery directly attributed to the appellee's attack by the board-certified surgeon's statement and evidence (sealed), under a FRAP 10(e) motion for inclusion in the record on appeal, due to the surgery and surgeon's attestation both occurring prior to the District Court's reconsideration, but due to timelines they were unable to be filed in the original record on appeal. The Circuit panel did not consider plaintiff-appellant's surgery in its ruling, and then used its ruling to deny acceptance of the FRAP 10(e) motion despite it being clearly critical evidence. Plaintiff-appellant contends that solely a coincidental conflict in timing is good cause for such key evidence to be allowed and considered, and the panel's denial of the FRAP 10(e) motion should be vacated, and the motion granted.

---

6 US v. Cowden, 4th Cir, 17-4046, Feb 2018

Notably, mandatory precedent guidelines indicate that none of the three factors from the Supreme Court, in Graham v. Connor, support the District or Circuit Panel's finding of the reasonableness of a use of force under the Fourth Amendment. The factors the en banc court should consider are: (1) there was no crime at issue, therefore no severity whatsoever; (2) plaintiff-appellant was never a suspect, and as shown on video with his legs ordered by Polson to have been spread wider than the TSA floormat footprints (as Polson testified in the record, without cause or excuse for stance widening), posed NO threat to the non-officer TSA screener nor to others; and (3) that appellant (per the record on appeal) was being fully cooperative to the search, and was not attempting any type of evasion. A 4th Amendment violation is clearly evident, justifying a full en banc rehearing and reversal of the district court's ruling to be in plaintiff-appellant's favor.

II. DISTRICT, FOURTH CIRCUIT, AND MANDATORY PRECEDENT BAR QUALIFIED IMMUNITY IN PARALLEL CASES AND CIRCUMSTANCES

Violations of Fourth Amendment claims are well-established law from parallel cases in this E.D.VA district and Fourth Circuit, which the district court and Circuit panel failed to consider in their ruling and review, ***rendering qualified immunity inapplicable***, and supporting vacating the Circuit panel's order and rehearing this

appeal en-banc. From Yates[7] this 4th Circuit Court stated that it "carefully conducted a thorough analysis pursuant to Saucier and determined that Officer Terry's conduct violated a constitutional right which was 'clearly established' at the time of the violation," (quoting Saucier[8]) which occurred prior to March 10, 2016 – the date of Polson's attack, defeating non-established law defenses. This Circuit Court has held that the law regarding excessive force violations ***was*** clearly established even that earlier gratuitous excessive force cases closely paralleling this instant case —and just as Terry in that case was thus on fair notice— that even a police officer [even though appellee is well-known to be merely a TSA screener and NOT to be a police officer, and appellant was in a consensual search] was not entitled to use "unnecessary, gratuitous, or disproportionate force [on a subject] who presented no threat to the safety of the officer or the public and who was compliant and not actively resisting arrest or fleeing." Appellee Polson's claims of non-established law, fail, supporting vacating of the panel's decision, and an en banc rehearing.

Further district and circuit precedent support an en banc rehearing. The E.D.VA District Court, affirmed by this Circuit Court, held in Smith[9] District Court's order

7 Yates v. Terry, 15-1555 4th Cir 2016
8 Saucier v. Katz, 533 US 194, 201 2001
9 Smith v. Ray, E.D.VA 2015, 4th Cir 12-1503 2015

denying Ray's motion for summary judgment on the basis of qualified immunity concerning Amanda Smith's excessive force claim, defeating non-established law claims. Yet in this instant case, the district court nevertheless granted arrested felony suspect and appellee's motion for summary judgment partially on the basis of qualified immunity. Thus, based on Yates, and Smith (and deriving from Saucier), the law ***was*** clearly established, defeating Polson's threadbare and contemptible demand for qualified immunity.

And lastly, for appellee to claim qualified immunity, he must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred.... (Wolk v. Seminole County, 276 Fed. App'x 898, 899 (11th Cir. 2008)). This was not done, but disregarded by the Circuit panel.

III. EVIDENCE WAS NOT CONSIDERED IN THE BEST LIGHT FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF – APPELLANT

The District Court's ruling appears to ascribe blame to plaintiff-appellant for transiting the TSA checkpoint, and attaches faux-credence to the appellant's acceptance of a TSA pat-down, while ignoring the true question that **appellant did not accede to a gratuitous, excessive force striking of his testicles by appellee Michael Gerard Polson as a condition of passage**! The complaint did not challenge or object to non-excessive force TSA security pat-downs. Specific

evidence not considered (re-cited from the record-on-appeal) that support an en banc rehearing and vacating the panel decision, to possibly reverse the district court's final ruling:

A) No excessive force standard for TSA pat-downs exists, nor has been defined, nor any measures created after years of pat-downs (possibly to avoid a standard and duty of care), nor any training provided to TSA screeners based on TSA documents (and testimony by appellee Polson, and Polson's TSA supervisor William Whetsell), all in the record and plaintiff-appellant's motion for summary judgment, therefore not meeting the standard required to claim qualified immunity in Wolk.[10]

B) Defendant-appellee testified admitting to "striking" appellant's testicles; the ***amount*** of force (which is not a Fourth Amendment requisite aspect) is the only item in dispute, but further supported by medical evidence & surgery.

C) Appellee testified to there being between 8-50 security cameras in checkpoint area, yet only one video was preserved, with suspiciously missing frames (as recognized by the district court, with people appearing and disappearing).

D) Appellee, TSA, DOJ, Appellee's supervisor (Whetsell), and MWAA all

10 Wolk v. Seminole County, 276 Fed. App'x 898, 899 (11th Cir. 2008)

attested/testified to being aware of verbal and written litigation holds made at the incident and repeated to MWAA police, TSA supervisors, and TSA general counsel offices within 24 hours for all videos within 200 feet of the checkpoint and all ESI, but appellee and all named groups testified to disregarding obligations and destroyed (spoliated) all but one security video.

E) Their evidence spoliation was filed in motions and cited in an order by the District Court in the record, which disregarded precedent and Rule 37 automatic sanctions requested by plaintiff-appellant at the time, plus in appellant's motion for summary judgment to be considered as having existed in Appellant's best light and favor for spoliated evidence in its ruling.

F) E.D.VA District Court precedent[11] addresses spoliation of videos and other ESI, whether or not a defendant-appellee or others consider that evidence to be relevant or even if they do not know whether the recordings have a view of any incident.[12] This precedent was disregarded, including on appeal.

---

11 Case citations requiring consideration of spoliated evidence to be in Plaintiff's favor are provided in the Table of Authorities.

12 In this District's precedent-setting "slip and fall" case of Aaron v. Kroger L.P., 2011 U.S. Dist. LEXIS 111004 (E.D. Va. Sept. 27, 2011)(Norfolk), the Court held that "Kroger was on notice of Plaintiff's request that the evidence be preserved. Kroger also knew or should have known that the security video footage — whether or not it showed Plaintiff's actual fall — might later prove relevant, such that preserving the tapes was clearly the more prudent course of action. Because this Court finds that Kroger willfully and deliberately destroyed the video footage from the day of the incident in question, Plaintiff's request for

G) The single video that was preserved was thoroughly impeached by plaintiff-appellant, with those failings (including people magically appearing and disappearing), and an appellant-made doll video that demonstrated that missing frames can render the striking force unable to be seen. Despite the district court not including its own hearing transcript recognizing missing frames in the video it relied upon (and in the record on appeal), it only referenced its belief in the video while ignoring the problems it cited earlier.

H) The district court cited witnesses that were not disclosed per FRCP Rule 26. TSA's Dillard and Yanette, listed in footnote 6 of the district court's ruling, provided key testimony in the court's interpretation and belief of a security video as true despite appellant's evidence of TSA-admitted editing and plainly visible missing frames even previously acknowledged by the district court, included in the transcripts in the record on appeal.

I) Appellee testified[13] to first not knowing TSA's Dillard and Yanette's names

---

an adverse inference instruction is granted." However, no adverse inference or consideration in appellant's best light was performed, and summary judgment against appellant flies in the face of this precedent as cited.

Samsung Electronics Co., Ltd. v. Rambus Inc, "[a litigant] ***is*** under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request." 439 F. Supp. 2d at 543 (E.D.Va. 2006)

13 Deposition of Polson, pgs 188-189, added to the record under FRAP 10(e)

or contact information, later changing testimony to withhold names under privilege[14]. THE EFFECT OF NOT PROVIDING WITNESS NAMES IS THE SAME! The inadmissible witnesses, clearly listed in plaintiff's motion for reconsideration, since appellant was not even aware of the hidden, inadmissible witnesses until the initial judgment was entered, were denied to exist in appellee's FRCP Rule 26 disclosures in objecting motions filed with the district court, and further denied to exist in deposition testimony from appellee, in what may be biggest DOJ cover-up since US v. Bundy! In a karma-laden comeuppance of irony, despite proven inadmissibility, **the district court cited the previously withheld witnesses as key evidence in its ruling.** The Circuit panel's not citing this clear failing despite appellant's identifying this error in the record, is absolute cause for vacating of the Circuit panel's ruling, and conducting an en-banc rehearing, to avoid further explanations of why FRCP Rule 26-violating, withheld evidence could possibly be considered supportive in appellee's favor.

IV. TSA'S PERMANENT, NATIONWIDE PROTECTIVE ORDER IS LIKELY UNCONSTITUTIONAL

The TSA protective order was submitted under motion by TSA and DOJ, both

---

14 Ibid., pg 190

representing the arrested felony sexual battery attacker Polson, with no assistance to the victim, Linlor. Without analysis, the district granted the order, and denied appellant's motion to reverse for cause. The order (copied in Appendix C) is explicitly written to "survive this case," and despite the district's ruling being unpublished, for the protective order to have national standing. This contradiction is problematic for future challenges, for a case to be unpublished, but a typically subordinate protective order to in this case, survive and be enforceable on its own.

While the protective order was ostensibly designed to safeguard Sensitive Security Information (SSI) from disclosure, no SSI was ever disclosed to plaintiff-appellant in this case! Appellant is known to TSA and DOJ to already use and be approved for use of SSI from other sources as part of his airline flight and air travel/security consulting duties, and this point was re-emphasized to the district court in plaintiff-appellant's objections to the protective order. Instead, TSA refused to hand over **any** SSI (even physically, on two cross-country trips made by appellant to DOJ offices in Alexandria, Virginia), nor via AMRDEC secure military file transfer, to which appellant and DOJ/TSA JAG Sylvertooth had access. Thus, the TSA protective order is moot for its claimed purpose.

Established law from 49 CFR 114(r), repeated in the record on appeal in

appellant's motions to reverse the protective order, state that TSA is barred from categorizing or using the Sensitive Security Information (SSI) designation to avoid litigation or avoid embarrassment. The protective order reverses established law. Additionally, the TSA protective order grants TSA authority OVER all federal and state courts, to retroactively designate any evidence as SSI, despite the 49 CFR 114(r) regulation barring this action. The effect, if not vacated, will be to enable TSA to designate any evidence as SSI, and then by claiming that evidence as inadmissible, to scuttle and foreclose any future litigation against TSA, regardless of unwarranted uses of excessive force or other illegalities.

V. UNCONTESTED VIOLATIONS OF 28 USC § 1927 WARRANT EXTRAORDINARY SANCTIONS UPON TSA AND DOJ AND THEIR ATTORNEYS IN THIS CASE

Appellant filed a motion for sanctions under 28 USC § 1927, which was unopposed and remains uncontested by TSA, DOJ, and their attorneys. Given the large volume of evidence similar to DOJ misdeeds in US v. Bundy for which sanctions were granted, the full en banc court should consider whether sanctions (monetary and professionally suspending, barring, or censuring) should be held against TSA, DOJ, and their attorneys for their willful interference and illegal

behavior violating 28 USC § 1927, and professional attorney obligations of conduct. For the opportunity to properly assess and review illegal behavior, vacating of the Circuit panel's order is warranted, and an en banc hearing necessary.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing en banc, vacate the panel opinion, and rehear this appeal en banc.

Respectfully submitted,

Captain James Linlor, pro se

October 30, 2018

Certificate of Compliance with Type-Volume Limit

Per FRAP 35(b)(2)(a), "a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words" exclusive of certification statements, appendices, and other count-excluded contents. Font and typeface are still complied with. See FRAP 28.1(e), 29(a)(5), 32(a)(7)(B), and 32(f).

A proportionally spaced typeface (sch as Times New roman) must include serifs and must be 14-point or larger. See FAP 32(a)(5), 932(a)(6).

This brief or other documents complies with the type-volume limits because, excluding the parts of the document exempted by FRAP 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of pro se/counsel, addendum, attachments), most of which do not apply to informal briefs and replies as since the 4th Circuit only uses informal briefs for pro se litigants.

This petition for en banc rehearing, this brief contains **3,891 words**.

This brief has been prepared in a proportionally-spaced typeface using LibreOffice Writer Version: 6.0.6.2, https://www.libreoffice.org/, a better and often free alternative to using Microsoft Word in Times New Roman 14-point font.

_/s/ Captain James Linlor _
Captain James Linlor
Pro se Plaintiff/Appellant

Certificate / Proof of Service.

I, Appellant/Plaintiff Captain James Linlor, hereby attest that on October 30, 2018, I served Appellee/Defendant Polson via his lead counsel via US mail service at the address listed below, and also filed this document with the 4th Circuit Clerk of the Court via overnight mail service, for delivery to the Clerk on October 31, 2018 at the addresses below:

4th Circuit Court of Appeals
Office of the Clerk
1100 East Main Street, Suite 501
Richmond, VA 23219 (804) 916-2700

And Defendant's counsel listed below:

MICHAEL GERARD POLSON,
in his individual capacity
817 Carlton Otto Lane #23, Odenton, MD 20120
c/o Kimere J. Kimball, Asst US Attorney
2100 Jamieson Ave, Alexandria, VA 22314
(703) 299-3763 ph; (703) 299-3983 fax

Attested to as true and correct under penalty of perjury:

JL ("Capt. James Linlor") date: 10/30/18

APPENDIX A (District Court's Ruling)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES LINLOR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:17-cv-0013 (AJT/JFA)
	)	
MICHAEL POLSON	)	
	)	
Defendant.	)	
	)	

ORDER

This action arises out of a security pat-down of the Plaintiff at Washington Dulles National airport on March 10, 2016. Specifically, Plaintiff James Linlor, appearing *pro se*, alleges that Defendant Michael Polson, a former Transportation Security Administration ("TSA") officer, struck Plaintiff in the groin area in violation of the Fourth Amendment during the airport screening. Plaintiff filed this *Bivens* action on January 4, 2017.[1] Pending before the Court are the parties' cross motions for summary judgment ("the Motions").[2] On January 19, 2018, the Court held a hearing on the Motions, following which the Court took the Motions under advisement. Upon consideration of the Motions, the memoranda and exhibits in support thereof and in opposition thereto, the arguments presented by counsel and *pro se* Plaintiff at the January 19, 2018 hearing, and for the reasons stated herein, Defendant's Motion for Summary Judgment is GRANTED, Plaintiff's Motion for Summary Judgment is DENIED; and this action is DISMISSED.

[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Plaintiff's Original Complaint [Doc. No. 1] was amended on February 7, 2017. *See* [Doc. No. 12] ("Am. Compl.").
[2] *See* Individual-Capacity Defendant's Motion for Summary Judgment [Doc. No. 233] ("Def.'s Motion for Summ. J."); Plaintiff's Motion for Summary Judgment [Doc. No. 237] ("Pl.'s Motion for Summ. J.") (collectively, "the Motions").

I. BACKGROUND

As required by Local Rule 56(B), Defendant has filed with his Motion a Statement of Undisputed Material Facts ("SOF"), with supporting references to the record. [Doc. No. 234] ("Def.'s Mem. in Supp."). However, in his opposition [Doc. No. 257], Plaintiff has not specifically responded to the SOF, as required under Local Rule 56(B). In his Motion for Summary Judgment [Doc. No. 237], Plaintiff has included a section styled "Listing of undisputed facts per CivLR 56(b): (items 43-83)," with only general supporting references to such items as "Defendant's deposition testimony," "per video evidence," and "per Plaintiff's attestations and video evidence." [Doc. No. 237] at 14-15 ("Pl.'s Listings"). Defendant has specifically responded to Plaintiff's Listing. [Doc. No. 265] ("Def.'s Opp. Mem.").

In determining whether there exists a genuine issue of material fact with respect to either pending summary judgment motion, the Court has considered Defendant's SOF, Plaintiff's failure to respond as required to Defendant's SOF (which the Court has considered in light of Plaintiff's *pro se* status), the Plaintiff's Listing and the Defendant's response thereto. After its independent review of the record, the Court finds that the material facts set forth in Defendant's SOF are undisputed and that to the extent there are any disputed issues of fact as between the SOF and the Plaintiff's Listing, those disputes are immaterial. Briefly summarized the following facts are uncontested unless otherwise stated:

On March 10, 2016, Plaintiff attempted to access the TSA security screening via the "Pre-Check" lane but was unsuccessful because of an error with the ticket-scanning device. SOF at 5, ¶ 11; Pl.'s Listings at 13, ¶ 47. Plaintiff was directed to proceed to the regular passenger check-in area for security screening. Linlor Dep. 68:2-4, Nov. 8, 2017. At this point, Plaintiff placed his suitcase and backpack on the conveyor belt and requested to "opt out" from the airport

screening machine that performs imaging of passengers. *Id.* at 68:11-24. The Defendant was summoned to perform a manual screening of the Plaintiff. SOF at 5, ¶ 13.[3] Before Defendant conducted the manual screening of Plaintiff, he asked the standard "divestment questions" to outline the procedures that were about to be performed and asked if Plaintiff had any sensitive areas in which he should be made aware. Linlor Dep. 90:23-25, 91:1-25, 94:1-25; Polson Dep. 11:10-12, Oct. 20, 2017. At some point prior to the manual screening, Plaintiff refused to place his wallet and other credentials into the screening machine and was asked to remove the credentials from his wallet. *See* Am. Compl. at 15, ¶¶ 15-18; Polson Dep. 11:13-22. At this point, the parties' allegations diverge.

Plaintiff alleges that after he refused to surrender his wallet, Defendant became agitated and refused requests for Defendant's supervisor. Am. Compl. at 15, ¶¶ 21-22. Plaintiff, nevertheless, submitted to the manual screening by stepping onto the rug reserved for screenings and placed his feet on the footprint markers. *Id.* at 15, ¶ 27; *Id.* at 16, ¶¶ 1-2. Plaintiff contends that Defendant then asked him to widen his stance without providing any justification. Pl.'s Listings at 13, ¶ 51. Plaintiff also claims that he was not wearing form-fitting or baggy jeans that would provide an obstruction to a pat-down and that Defendant failed to follow proper procedures as dictated by TSA training guidelines. *Id.*, ¶ 52; *Id.* at 14, ¶ 53. While performing the pat-down, Plaintiff contends that Defendant "rammed his hand" into Plaintiff's genitals, causing the Plaintiff to bend over and step away in pain. Am. Compl. at 16, ¶¶ 16-18. Plaintiff contends that Defendant laughed after striking Plaintiff and refused to comply with Plaintiff's numerous

[3] The parties dispute whether they first interacted with each other on the "dirty" or "sterile" side of the TSA checkpoint. Although not clear from the record, the "dirty side" appears to be the side of the screening area before passengers have completed the screening process, and the "sterile side" refers to the area after passengers have completed the screening process. Plaintiff contends it is likely that his first interaction with Defendant was on the "dirty side" of the TSA checkpoint. Pl.'s Listings at 13, ¶ 48. Defendant testified during deposition that his first interaction occurred on the "sterile side" of the TSA checkpoint. Def.'s Opp. at 7.

requests for an apology. *Id.*, ¶¶ 20-23. The Metropolitan Washington Airports Authority ("MWAA") police were called but refused to take action against Defendant or view the security surveillance memorializing the incident. *Id.*, ¶¶ 25-27; Pl.'s Listings at 15, ¶ 64. The police also refused to take the Defendant into custody after the Plaintiff placed the Defendant under citizen's arrest. Pl.'s Listings at 15, ¶ 64. Plaintiff disputes the authenticity of the video filed by Defendant which shows the March 10, 2016 incident; and in support of his Motion for Summary Judgment, Plaintiff has filed a DVD to demonstrate how a video can be modified by reducing the framerate in a video. [Doc. No. 236] at 1-2 ("Pl.'s Request with Summ. J. for Leave of the Court to File DVD with Reduced Framerate Video").

Contrary to Plaintiff's assertions, Defendant contends that he conducted the pat-down of Plaintiff's body and groin area in accordance with the standard pat down policies and procedures as outlined by the on the job ("OJT") training checklist. Def.'s Mem. in Supp. at 7, ¶ 21. In support of his Motion for Summary Judgment, Defendant has filed with the Court a DVD, which documents the actual pat-down at issue. [Doc. No. 235].

II. STANDARD OF REVIEW

Summary judgment is appropriate only if the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Evans v. Techs. Apps. & Serv. Co., 80 F.3d 954, 958 (4th Cir.1996). The party seeking summary judgment has the initial burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248. Once a motion for summary judgment is properly made and

supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986). To defeat a properly supported motion for summary judgment, the non-moving party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. Whether a fact is considered "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248. The facts shall be viewed, and all reasonable inferences drawn, in the light most favorable to the non-moving party. *Id.* at 255; *see also Lettieri v. Equant Inc.*, 478 F.3d 640, 642 (4th Cir. 2007). "When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (quotation marks and citation omitted).

III. ANALYSIS

Each party contends that he is entitled to summary judgment as a matter of law: Plaintiff, because the search was illegal as a matter of law,[4] and Defendant, because there was no Fourth

---

[4] In his First Amended Complaint, Plaintiff alleges the following:

> **The claim alleged is for a violation of the Plaintiff's fundamental rights under the 4th Amendment against unreasonable searches, in this case, the felonious sexual striking of the Plaintiff by the Defendant, and seeking monetary damages available as proscribed under Bivens in such cases.**
>
> **This complaint is a Bivens action for violations of the Fourth Amendment by TSA agent Michael Polson, who was arrested for aggravated (felony) sexual battery for striking and off-duty pilot in the groin area during a non-standard security pat down at Dulles airport near Washington, DC on March 10, 2016, and supported by numerous video and audio recordings, written reports, and undisputed filings by Plaintiff (incorporated by reference) in the same venue. This Complaint seeks specific damages, all monetary (as proscribed by Bivens) in relief.**

Am. Comp. at 2, ¶¶ 14-28 (boldface in original).

Amendment violation as a matter of law, or even if there were, he is entitled to qualified immunity as a matter of law. For the reason stated below, the Court concludes based on the video of the actual encounter between the parties and the other uncontested facts as reflected in the pleadings, affidavits, and exhibits, that there was no Fourth Amendment violation as a matter of law; and alternatively, that, in any event, Defendant is entitled to qualified immunity as a matter of law.

A. Excessive Force Claim

As an initial matter, Plaintiff's claim for a "felonious sexual striking" in violation of Plaintiff's Fourth Amendment's prohibition against unreasonable searches is, in essence, an excessive force claim. Am. Compl. at 2, ¶ 16. When an excessive force claim arises in the context of a search by a federal official, in this case a TSA officer, it is governed by the Fourth Amendment. *See Graham v. Connor,* 490 U.S. 386, 388 (1989) (the Fourth Amendment governs claims of excessive force during the course of an arrest, investigatory stop, or other "seizure" of a person). Accordingly, Plaintiff's claim of excessive force is properly analyzed under the Fourth Amendment's standard of reasonableness. *See Vathekan v. Prince George's County*, 154 F.3d 173, 178 (4th Cir.1998). "[T]he 'reasonableness' inquiry in an excessive force case [governed by the Fourth Amendment] is an objective one: the question is whether the [TSA] officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397 (citations omitted). Further, "'[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." *Id.* at 396 (internal citation omitted). The extent of injury suffered as a result of the search is relevant, both because it may suggest whether the use of force could plausibly have been thought necessary in a particular situation, *Whitley v.*

Albers, 475 U.S. 312, 321 (1986), and because it may provide some indication of the amount of force applied. *Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010) (rejecting the notion that an excessive force claim involving only de minimis injury is subject to automatic dismissal). Nonetheless, "[i]njury and force . . . are only imperfectly correlated, and it is the latter that ultimately counts." *Id.* at 38. A district court must balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)) (internal quotation marks omitted). The outcome of this balancing test necessarily depends on the facts and circumstances of the particular case." *Martin v. Gentile*, 849 F.2d 863, 868 (4th Cir.1988) (citing *Garner*, 471 U.S. at 8-9).

Based on the record before the Court, the Court concludes as a matter of law that Defendant's actions were objectively reasonable in light of the circumstances. The parties agree that the Plaintiff was properly subjected to a manual pat-down because he refused to surrender certain documents before passing through the airport screening device. *See* Am. Compl. at 15; SOF at 6, ¶¶ 16-17. Since Plaintiff opted out of the less intrusive screening device, Plaintiff himself concedes that it was objectively reasonable that an alternative method for screening should be performed, such as a manual pat-down. Linlor Dep. 68:14-18; *see also Chandler v. Miller*, 520 U.S. 305, 323 (1997) (observing that airport screenings are reasonable in locations where the "risk to public safety is substantial and real" such as airports). Thus, Defendant's decision to use a manual pat-down was reasonable since Plaintiff elected out of the standard walk-through screening method.

The record also demonstrates as a matter of law that Defendant initially proceeded with the pat-down process in a manner that was reasonable and in compliance with TSA's pre-pat-down procedures. Under TSA's checklist for performing manual screenings as well as its training material, when an individual, such as Plaintiff, refuses to be screened by the Advanced Imaging Technology ("AIT") screening machine, a TSA officer must advise the individual that TSA will conduct a pat-down, which will "cover sensitive areas, including the upper inner thigh area." [Doc. No. 234-2] at 2 ("Def.'s Ex. 2"). Accordingly, a TSA officer must also perform a "hands-off demonstration" if the pat-down will include a search of a male's groin, buttocks, and upper inner thighs, Def.'s Ex. 2 at 4; and ask the individual if there are areas of his body that may be sensitive or painful to touch. [Doc. No. 234-4] at 7 ("Def's Ex. 4"). Defendant complied with the required protocol and before performing the pat-down of Plaintiff, he "immediately started asking [Plaintiff] divestment questions." Polson Dep. 11:10-11. Plaintiff concedes in this regard that Defendant executed the "standard spiel" TSA officers are required to give, including offering a private screening area and asking if Plaintiff had any areas of his body that were sensitive to the touch. Linlor Dep. 90:23-24, 91:1-20.

As to the performance of the actual pat-down itself, the parties dispute in certain respects what actually occurred; and for the purposes of Defendant's Motion for Summary Judgment, the Court is required to review the facts in light most favorable to Plaintiff. *Porter v. U.S. Alumoweld Co.*, 125 F. 3d 243, 245 (4th Cir. 1997). However, where there is video evidence of what actually happened, as there is here, the Court may rely upon and accept as true the facts established by the video. *Scott v. Harris*, 550 U.S. 372, 378 (2007). This principle is based on the proposition that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt

that version of the facts for the purposes of ruling on a motion for summary judgment." *Id.* at 380.

Plaintiff contends that Defendant violated Plaintiff's Fourth Amendment right against unreasonable searches when Defendant "aggressively karate-chopped" Plaintiff in the groin without cause during a TSA pat-down. Linlor Depo. 227:1-3; Pl.'s Motion for Summ. J. at 3, ¶ 8. Plaintiff's version of events on March 10, 2016, however, is flatly contradicted by the video evidence, which fully supports Defendant's position that his pat-down of Plaintiff was no more intrusive than necessary to complete a proper pat-down consistent with TSA procedures. In that regard, the video shows that the pat-down lasted approximately three minutes. Def.'s Ex. 7 at 4:23-6:55. During that time, Defendant began the pat-down by searching the rear of Plaintiff's back, arms, waistline, buttocks, and legs. *Id.* at 4:23-6:02. Defendant then searched the front part of Defendant's body by searching the top portion of Plaintiff's body, including the chest, torso, and abdomen. *Id.* at 6:03-6:40. Defendant moved to the lower half of Plaintiff's body by performing a search of Plaintiff's right leg, beginning with a search of the groin area. *Id.* at 6:45. Defendant then searched Plaintiff's left leg, beginning with a search of the groin. *Id.* at 6:53-6:55. As Defendant moved into the left leg's groin area, Plaintiff sharply reacts, briefly leans forward and steps away. *Id.* at 6:56.

It is undisputed that Defendant searched Plaintiff's right leg consistent with the standard pat down policies and procedures at outlined by the OJT checklist.[5] Linlor Dep. 224:9-18. During that part of the pat-down, Plaintiff did not show any signs or indicia of discomfort in the manner by which Defendant completed the pat-down and the video establishes as a matter of law that Plaintiff did not use excessive force in conducting a search of Plaintiff's right leg. Def.'s Ex.

[5] The OJT Training Checklist requires TSA officers to conduct searches in the following manner, "[w]ith the palms touching the legs, place one hand on the upper outer thigh and the other hand on the upper inner thigh." Def.'s Ex. 2 at 6, ¶ Q1.

7 at 6:45-6:53; *see also* Linlor Dep. 208:4-6. Although Plaintiff contends otherwise, the video shows that Defendant used the same method of executing the contested pat-down of Plaintiff's left leg as he did the right. Def.'s Ex. 7 at 6:53-6:55. Based on the record, the Court finds as a matter of law that Defendant's pat-down of his left leg and the contact with its groin area was reasonable and did not involve excessive force. No reasonable fact finder could find otherwise.[6]

The Court also finds no facts sufficient to raise a reasonable inference, as Plaintiff contends, that the video capturing the pat-down was altered in some way to misrepresent the level of force used by Defendant.[7] Nor is Plaintiff's excessive force claim sufficiently supported by his claims of injury.[8] *See Smith v. Murphy*, 634 F. App'x 914, 917 (4th Cir. 2015) ("[T]he severity of injury resulting from the force used has always been but one 'consideration in

---

[6] The record, and the video in particular, does not support as a matter of law Plaintiff's contention that Defendant *intended* to use excess force. In any event, whether Defendant acted intentionally is not the proper analysis for evaluating an excessive force claim under the Fourth Amendment. *See Martin v. Gentile*, 849 F.2d 863, 869 (4th Cir. 1988) (finding the proper analysis is "wholly objective" and does not take into account the arresting officer's "subjective intent or motivation") (quoting *Scott v. United States*, 463 U.S. 128, 137-38 (1977) (Rehnquist, J., concurring)); *see also Pegg v. Hernberger*, 845 F.3d 112, 120 (4th Cir. 2017) ("Subjective factors involving the officer's motives, intent, or propensities are not relevant.") (citation and quotation marks omitted).

[7] Specifically, Plaintiff contends that the framerate of the video was altered to distort the force applied to his groin area and in support of that contention, submitted a demonstration DVD that he claims shows through three 17-second videos how framerate reduction can affect visual depictions. There is nothing in Plaintiff's demonstrative DVD, however, that would allow a fact finder to conclude that the actual video of the parties' encounter has in fact has been altered. In that regard, Supervisory Transportation Security Inspector Bryan Dillard filed a declaration that the closed-circuit television (CCTV) system used at IAD is owned and operated by MWAA and that there are only a limited number of TSA employees who are authorized to make such as request. [Doc. No. 43-1] at 2-3. Mr. Dillard attested that on March 10, 2016, he requested the video from MWAA and that MWAA fulfilled his request by exporting the footage in question from the CCTV system to a video file. *Id.* at 3. Assistant Federal Security Director of Inspections for TSA Terry Yanette also filed a declaration, attesting that the IAD CCTV system is encoded with a proprietary codec to ensure the integrity of footage downloaded from the system and to facilitate the admissibility in court. [Doc. No. 43-2] at 3. Moreover, Plaintiff's contentions of alteration are based on conclusory, unsupported challenges to the video's authenticity and chain of custody. *See* Pl.'s Listings at 16, ¶ 69; *id.* at 17 ¶ 83 ("No videos of MWAA officers reviewing the video were saved, despite Plaintiff's requests . . . . "); *cf.* [Doc. Nos. 43-1, 43-2] (two declarations from TSA officials, verifying the authenticity of Defendant's filed DVD); *see also* Defendant's Motion to for Leave to File DVD with the Clerk of Court [Doc. No. 235], which was granted on December 29, 2017 [Doc. No. 235].

[8] Plaintiff first saw an urologist on April 6, 2016 regarding the alleged injuries sustained from the pat-down on March 10, 2016. Pl.'s Motion for Summ. J., Ex. A, 20. The urologist's report submitted in the record reflects the Plaintiff's subjective complaints and the results of an ultrasound of Plaintiff's testicles, which showed no evidence of hematoma, intratesticular mass, or epididymitia. *Id.*

determining whether force was excessive.'") (quoting *Jones v. Buchanan*, 325 F.3d 520, 530 (4th Cir. 2003)).

The dispositive issue in a Fourth Amendment analysis is whether "the totality of the circumstances justified a particular sort of search or seizure." *Garner*, 471 U.S. at 8–9. Here, Plaintiff submitted to a manual pat-down because he refused to be screened by the walk-through AIT screening machine; and the record establishes as a matter of law that Defendant's actions were reasonable in light of the circumstances and that Plaintiff was not subjected to an excessive force in violation of the Fourth Amendment.

B. Qualified Immunity.

Defendant also contends that regardless of whether there was a Fourth Amendment violation, he is entitled to qualified immunity because his conduct did not violate clearly established statutory or constitutional rights of which a reasonable person in his position would have known.

The doctrine of qualified immunity shields government officials from civil liability when their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). Whether the invocation of qualified immunity is appropriate therefore requires courts to assess whether there was a violation of a constitutional right and whether the "right in question" is one that is '"clearly established."' *Vance v. Rumsfeld,* 701 F.3d 193, 197 (4th Cir.2012) (quoting *Pearson v. Callahan*, 555 U.S. 223, 243 (2009)).[9] In assessing whether a right is "clearly established," it

[9] Courts may exercise discretion in determining which of the two prongs of the qualified immunity analysis should be approached first. *Pearson*, 555 U.S. at 236 (order of analysis is determined "in light of the circumstance in the particular case at hand").

must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

For the reasons stated above, Defendant's conduct in performing a pat-down of the Plaintiff did not violate the Fourth Amendment. Nevertheless, the Court also concludes, in the alternative, that even if Plaintiff could somehow demonstrate that Defendant violated his Fourth Amendment rights, Defendant is entitled to qualified immunity as a matter of law since a TSA officer in Defendant's position would not have understood that what he was doing by way of Plaintiff's pat-down violated a clearly established aspect of the rights protected under the Fourth Amendment.[10]

Finally, for the same reasons that require the granting of Defendant's Motion, Plaintiff's Motion must be denied, as there are no undisputed facts that would entitle Plaintiff to judgment in his favor as a matter of law.

II. CONCLUSION

For the above reasons, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment [Doc. No. 237] be, and the same hereby is DENIED; and it is hereby

ORDERED that Defendant's Motion for Summary Judgment [Doc. No. 233] be, and the same hereby is, GRANTED; and it is further

ORDERED that this action be, and the same hereby is, DISMISSED with prejudice.

[10] *See, e.g., Ruskai v. Pistole*, 775 F.3d 61, 77 (9th Cir. 2014) ("[F]ourth Amendment does not prevent TSA from searching for both metallic and nonmetallic weapons on passengers who trigger WTMD [Walk Through Metal Detector] alarms just as it does on passengers who decline to pass through AIT scanners."); *see also Corbett v. Transportation Sec. Admin.*, 767 F.3d 1171, 1182 (11th Cir. 2014) ("Undeniably, a full-body pat-down intrudes on privacy, but the security threat outweighs that invasion of privacy.").

The Clerk is directed to forward copies of this Order to all counsel of record and to the *pro se* Plaintiff, and to enter judgment in favor of Defendant pursuant to Fed. R. Civ. P. 58.

The is a final order for purposes of appeal. To appeal, Plaintiff must file a written Notice of Appeal with the Clerk of Court within thirty (30) days of the date of this Order. A Notice of Appeal is a short statement stating a desire to appeal an order and identifying the date of the order Plaintiff wishes to appeal. Failure to file a timely Notice of Appeal waives Plaintiff's right to appeal this decision.

/s/
Anthony J. Trenga
United States District Judge

Alexandria, Virginia
February 1, 2018

APPENDIX B (Circuit Panel Court's Ruling)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1303

JAMES LINLOR, Capt.,

Plaintiff - Appellant,

v.

MICHAEL POLSON,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, District Judge. (1:17-cv-00013-AJT-JFA)

Submitted: September 13, 2018 Decided: September 17, 2018

Before NIEMEYER and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

James Linlor, Appellant Pro Se. Kimere Jane Kimball, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

James Linlor appeals the district court's order denying relief on his complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and denying reconsideration. We have reviewed the record and find no reversible error. Accordingly, we deny Linlor's motion to supplement the record and affirm for the reasons stated by the district court. *Linlor v. Polson*, No. 1:17-cv-00013-AJT-JFA (E.D. Va. Feb. 1, 2018 & Mar. 16, 2018). Additionally, we deny Linlor's motions for sanctions, and we dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C (TSA Protective Order)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

JAMES LINLOR,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action No. 1:17-CV-00013(AJT/JFA)
	)	
MICHAEL POLSON,	)	
	)	
Defendant.	)	
	)	

~~[PROPOSED]~~ PROTECTIVE ORDER REGARDING SENSITIVE SECURITY INFORMATION (SSI)

This Court has determined that the proceedings in this action necessitate the disclosure and production to Plaintiff of specified materials that contain Sensitive Security Information (SSI) as defined by 49 C.F.R. Part 1520. As required by Section 525(d) of the Department of Homeland Security Appropriations Act of 2007, Pub. L. No. 109-295, § 525(d), 120 Stat. 1355, 1382 (Oct. 4, 2006) (hereinafter, "Section 525(d)"), as currently reenacted, this Court has further ordered that before such disclosure and production can occur, it will enter an order that protects the SSI from unauthorized or unnecessary disclosure and specifies the terms and conditions of access. *See* ECF Nos. 191 & 225. Accordingly, it is hereby ORDERED as follows:

1. SSI is a specific category of information that requires protection against unauthorized disclosure pursuant to 49 U.S.C. § 114(r) and 49 C.F.R. Part 1520.

2. Access to SSI is limited to "covered persons" with a "need to know" as set forth in 49 C.F.R. §§ 1520.7 and 1520.11. Pursuant to Section 525(d), the Court has determined that Plaintiff shall be designated as a covered person under 49 C.F.R. § 1520.7 for the limited purpose of having access to SSI pertaining to pat-downs of the groin area that is contained in

Chapter 4 of the Standard Operating Procedures Manual ("SOP Manual"). *See* ECF. Nos. 191 & 225.

3. Plaintiff may access SSI furnished to him pursuant to this protective order (and this Court's prior orders regarding the SSI in question) under the terms and conditions of this Order and subject to the requirements for marking, handling, and storing SSI set forth in 49 C.F.R. Part 1520. Plaintiff is only authorized to access SSI pertaining to pat-downs of the groin area that is contained in Chapter 4 of the SOP Manual. *See* ECF No. 191. Plaintiff's designation as a covered person pursuant to Section 525(d) does not authorize his access to any other SSI.

4. "Covered persons," including Plaintiff for the limited purpose of litigating this case, have an express duty to protect against the unauthorized disclosure of SSI. 49 C.F.R. § 1520.9. SSI must be safeguarded in such a way that it is not physically or visually accessible to persons who do not have a "need to know," as defined in 49 C.F.R. § 1520.11. When unattended, SSI must be secured in a locked container or office, or other restricted access area. Plaintiff must follow all procedures for handling SSI set forth in 49 C.F.R. Part 1520 and all other applicable statutes and regulations.

5. For the purpose of this litigation and the SSI that will be furnished to him pursuant to this Protective Order, Plaintiff is the only individual with a recognized need to know; no further dissemination of this material is permitted without the prior approval of TSA or this Court. Plaintiff must not disclose SSI to any person or entity other than the Court, Defendant, counsel for Defendant, TSA, and counsel for TSA. Any submission or presentation of SSI to the Court must be made under seal. Where possible, only the portions of the filings that contain SSI shall be filed under seal. Plaintiff must not include any SSI in materials filed on the public docket. Material filed under seal will be available only to Plaintiff, Defendant, counsel for

Defendant, this Court and its personnel, and with regard to any motion, filing, or other matter implicating TSA, to TSA and counsel for TSA.

6. All material containing SSI shall be marked in accordance with 49 C.F.R. § 1520.13. Prior to filing any document containing SSI, including but not limited to any memoranda of law, the filing party shall mark the document with the following on the header of each page:

SUBJECT TO SENSITIVE SECURITY INFORMATION PROTECTIVE ORDER IN *LINLOR V. POLSON*, ET AL., No. 1:17cv13 SENSITIVE SECURITY INFORMATION

Likewise, the filing party shall mark the document with the following on the footer of each page:

WARNING: THIS DOCUMENT MAY CONTAIN SENSITIVE SECURITY INFORMATION THAT IS CONTROLLED UNDER 49 CFR PART 1520. NO PART OF THIS RECORD MAY BE DISCLOSED TO PERSONS WITHOUT A 'NEED TO KNOW,' AS DEFINED IN 49 CFR PART 1520, EXCEPT WITH THE WRITTEN PERMISSION OF THE ADMINISTRATOR OF THE TRANSPORTATION SECURITY ADMINISTRATION. UNAUTHORIZED RELEASE MAY RESULT IN CIVIL PENALTY OR OTHER ACTION.

Material containing SSI that inadvertently has not been marked as SSI still must be safeguarded against unauthorized disclosure with the same care as if it was marked.

7. Material that is marked as SSI or, though not marked, contains SSI, shall be treated as confidential and shall not be published or made available to the public in any form.

8. Because SSI may not be publicly disclosed, the parties may petition this Court in advance of any hearing or other proceeding in open court in which there is a possibility that SSI may be disclosed that the relevant portion of the proceedings be closed to the public.

9. Plaintiff may use SSI disclosed to him in this litigation only for the purposes of the litigation.

10. This order is without prejudice to the rights of any party to make any objection to discovery or use of SSI, or materials that may contain SSI, permitted by the Federal Rules of Civil Procedure, or any statute, regulation, or other authority.

11. If this action proceeds to trial, the parties shall meet and confer after the close of discovery to formulate an agreement regarding the use and handling of SSI at trial. Any such agreement shall be presented to the Court for approval. If the parties are unable to reach agreement, the disputed issues shall be presented to the Court for resolution.

12. If this action proceeds to trial, TSA may propose additional measures to the Court to protect any SSI presented during the trial in any form, including testimony.

13. In the event of a dispute regarding whether certain material contains SSI or whether certain information is SSI, the parties shall meet and confer in an attempt to resolve the dispute consensually. If the parties fail to resolve the dispute, TSA will issue a final order regarding the specific information at issue pursuant to 49 U.S.C. § 114(r). Final orders of the TSA concerning the designation of SSI are reviewable exclusively in the United States courts of appeals in accordance with 49 U.S.C. § 46110.

14. Within 30 days of termination of this litigation, including any appellate proceedings, Plaintiff shall either destroy or return to TSA via the United States Attorney's Office for the Eastern District of Virginia all materials in his possession that contain SSI that was provided to him in connection with this case. If Plaintiff elects to destroy rather than return materials, he shall certify in writing to TSA that the materials have been properly destroyed. Plaintiff must send the written certification within 30 days of the termination of this litigation to TSA care of the United States Attorney's Office for the Eastern District of Virginia using the same address used for service of materials on the Defendant in this case. Plaintiff's failure to provide this certification may be grounds for TSA to take action in accordance with Paragraphs 17 and 18 of this Order.

15. No officer or employee of the United States, including counsel for Defendant and all officers and employees of the Department of Homeland Security and the Department of Justice, shall bear any responsibility or liability for any unauthorized disclosure of any materials or information by Plaintiff during or after the completion of this litigation.

16. This order shall not affect any objection to discovery or admissibility into evidence that any party may have.

17. If Defendant or TSA has reason to believe that Plaintiff has disclosed SSI in violation of this Order or otherwise violated the terms of this Order, Defendant or TSA may move the Court to order appropriate corrective action, which may include revoking Plaintiff's access to SSI and requiring him to return or destroy any materials containing SSI.

18. In addition to any other remedies that are available under law, any Party, person, firm, or entity responsible for an unauthorized disclosure of Sensitive Security Information protected by this SSI Protective Order may be subject to a civil penalty of up to $50,000, for each violation and any other remedy provided under 49 C.F.R. § 1520.17.

19. Plaintiff, Defendant, and TSA may move the Court for relief from, or modification of, any term or provision of this order.

20. This Order shall survive the termination of this litigation.

So Ordered this 21ST day of December 2017.

BY THE COURT:

/s/ JFA
John F. Anderson
United States Magistrate Judge